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No. 03-1618

Supreme Court, U.S.
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In The
Supreme Court of the United States

CATHOLIC CHARITIES OF SACRAMENTO,

Petitioner,

v.

CALIFORNIA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, NATIONAL ASSOCIATION OF EVANGELICALS AND ETHICS & RELIGIOUS LIBERTY COMMISSION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is a state law a "neutral law of general applicability" within the meaning of *Oregon Employment Division v. Smith*, 494 U.S. 872 (1990), where the law employs religious criteria unrelated to the interests furthered by the law to classify religious institutions?

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 120 accredited law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

Through a network of volunteer attorneys and law professors, the Center provides information to the public and the political branches of government concerning the interrelation of law and religion. Since 1980, the Center has filed briefs *amicus curiae* in defense of individuals, Christian and non-Christian, and on behalf of religious organizations in virtually every case before the Supreme Court involving church/state relations. The Christian Legal Society's national membership, years of experience, and available professional resources enable it to speak with authority upon religious freedom matters before this Court.

The **National Association of Evangelicals** (NAE) is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions, and individuals that includes more than 50,000 local churches from 74

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[1] Counsel for a party did not author this brief, in whole or in part. No one, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of the brief, with the exception of the Alliance Defense Fund, a non-profit religious liberties organization. *See* S. CT. RULE 37.6.

different denominations and serves a constituency of over 20 million people. Religious freedom is a gift of God and vital to the limited government which is our American constitutional republic.

The **Ethics & Religious Liberty Commission** is the ethics, moral concerns, and religious liberty agency for the Southern Baptist Convention, the Nation's largest non-Catholic denomination, with sixteen million members in over 42,000 autonomous local churches. The Commission is charged with addressing public policies affecting religious liberty domestically and abroad. We are concerned with government attempts to define the mission and ministry of the church, believing this to be outside the purview of government and a direct violation of the First Amendment of the Constitution.

SUMMARY OF ARGUMENT

Petitioner's case warrants review by writ of certiorari because the Supreme Court of California radically departed from this Court's guiding case law delineating the standard of constitutional review of a law of that State that trenches upon a fundamental constitutional right, that of free exercise of religion. Because the Women's Contraception Equity Act's religious employer exemption distinguishes among religious institutions based on religious criteria, it is neither facially nor substantively neutral with respect to religion. In addition, the Act is under-inclusive with respect to the interests it is intended to further. As a result, the religious employer exemption is subject to strict scrutiny review. Since the immediate objectives of the Act are not compelling interests, and the religious employer exemption criteria are not narrowly

tailored to any broadly stated interests furthered by the Act, the religious employer exemption fails strict scrutiny.

Review is also warranted because the religious employer exemption criteria also violate the Church Autonomy doctrine embedded in the First Amendment. By requiring state officials to interpret religious doctrine, these criteria involve state officials in activities outside their competence, and result in government entanglement with religion in a way that leads to government favoritism and influence.

ARGUMENT

I. CERTIORARI IS WARRANTED TO ADDRESS THE IMPORTANT FEDERAL QUESTION WHETHER A STATE LAW IS A "NEUTRAL LAW OF GENERAL APPLICABILITY" WITHIN THE MEANING OF *OREGON EMPLOYMENT DIV. V. SMITH*, 494 U.S. 872 (1990), WHERE THE LAW EMPLOYS RELIGIOUS CRITERIA UNRELATED TO THE INTERESTS FURTHERED BY THE LAW TO FAVOR CERTAIN RELIGIOUS GROUPS.

Amici adopt Petitioner's Statement of the Case set forth in its Petition. *Amici* particularly note that the Women's Contraception Equity Act requires group and individual health insurance policies and disability insurance policies that include prescription drug benefits to also include coverage for prescription contraceptive methods. Cal. Health & Safety Code § 1367.25(b)(1); Cal. Ins. Code § 10123.196(d)(1) (the "Act"). The Act exempts "religious employers," but only if contraception "is contrary to [their] religious tenets." Cal. Health & Safety Code § 1367.25(b)(1); Cal. Ins. Code § 10123.196(d)(1).

Further, the statutory phrase "religious employers" does not encompass all religious institutions. Instead, the phrase applies only to those institutions that satisfy the following four criteria: (A) The inculcation of religious values is the purpose of the entity; (B) The entity primarily employs persons who share the religious tenets of the entity; (C) The entity serves primarily persons who share the religious tenets of the entity; and (D) The entity is a nonprofit organization pursuant to Section 6033(a)(2)(i) or (iii) of the Internal Revenue Code of 1986, as amended (which exempt from certain tax filings churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order). Cal. Health & Safety Code § 1367.25(b)(1); Cal. Ins. Code § 10123.196(d)(1). Because Catholic Charities does not satisfy these criteria, the Act "present[s] Catholic Charities with the dilemma of either refusing to provide health insurance coverage for its employees or facilitating the sin of contraception, both of which violate its religious beliefs." *Catholic Charities v. Superior Court*, 109 Cal. Rptr. 2d 176, 182, 187 (Cal. Ct. App. 2001).

In evaluating claims under the federal Free Exercise Clause, the United States Supreme Court has adopted the rule that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Employment Division, Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990)). However, "[a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi* at 531-32. Because the

Act is not neutral and generally applicable, the burden it imposes on the religious practice of Catholic Charities should have been evaluated under strict scrutiny.

The Court has not fully delineated the contours of the neutrality and general applicability requirements, although it has noted that "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. As discussed below, the general applicability requirement evaluates the extent to which burdens imposed by a law apply broadly to all persons or conduct implicating the interests the law seeks to advance. By contrast, the neutrality requirement focuses more narrowly on the specific treatment of religious considerations by a particular law.

A. The California Statute at Issue is Not Neutral as to Religion Where it Employs Criteria Unrelated to the Interests Furthered by the Law to Favor Certain Religious Groups.

California's Act is not neutral with respect to religion because it uses religious criteria to determine whether or not a religious institution is exempt. The Court in *Lukumi* stated that "the minimum requirement of neutrality is that a law not discriminate on its face." 508 U.S. at 533. The Court noted that "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* With respect to the Act's religious employer exemption criteria, there is clearly no secular meaning for "inculcating religious values," sharing of "religious tenets," or organizing as a church. As a result, the Act does not even satisfy the minimum requirement of facial neutrality.

Second, the religious criteria set forth in the Act are unrelated to the interests furthered by the Act. In other words, the religious criteria serve not to protect or promote the interests of the Act, but rather merely to distinguish between favored and unfavored religious institutions. In *Lukumi*, the Court evaluated several city ordinances that banned the ritual sacrifice of animals; these laws directly burdened the religious practice of local members of the Santeria religion, who challenged the laws in court. 508 U.S. at 525-28. The Court held that the ordinances were not neutral in part because they were drafted to suppress religious conduct without reference to the legitimate ends asserted in their defense. *See id.* at 535-40. The Court acknowledged that the ordinances address concerns "unrelated to religious animosity" such as public health and prevention of cruelty to animals. *Id.* at 535. However, in reading the ordinances together, the Court concluded that they "disclose an object remote from these legitimate concerns." *Id.* Specifically, "although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished." *Id.* at 536. The same "remote object" appears with respect to the Act's religious employer exemption criteria: the criteria merely serve to distinguish between favored and disfavored religious groups.

Further, even assuming the state has a religiously neutral interest in protecting employees of religious institutions from the religious values of their employers (which it does not), such justification does not explain any of the criteria in the exemption except the employment condition. There is no reason related to this justification, or to the other purposes of the Act, to make exemptions turn on whether religious institutions have the purpose of inculcating religious values, or serve only persons who share their religious

tenets, or qualify under Section 6033(a)(2)(i) or (iii) of the Internal Revenue Code. As the Court in *Lukumi* stated, "a law which visits gratuitous restrictions on religious conduct . . . seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Lukumi*, 508 U.S. at 538.

In *Larson v. Valente*, the Court stated that "the fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief." 456 U.S. 228, 246 (1982) (quotation omitted).[2] The state law at issue in *Larson* required charitable and religious organizations soliciting contributions to register with the state and submit periodic reports on its solicitation activities. The law contained an exemption, however, for religious organizations that received more than half of their total contributions from members or affiliated organizations. *Id.* at 231-32. In striking down the exemption, the Court held that even though the distinction between covered and exempt religious organizations was formally neutral in that it did not turn on religious criteria, the exemption was not actually neutral with respect to religion. Rather, the Court determined that the criteria "effectively distinguishe[d] between well-established churches that have achieved strong but not total financial support from their members . . . and churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members. . . ." *Id.* at 245 n.23 (internal citation

[2] Although *Larson* was decided under the Establishment Clause, the Court expressly noted that the "constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." 456 U.S. at 245.

and quotation omitted). As a result, the statute was "not simply a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations," but rather made "explicit and deliberate distinctions between different religious organizations." *Id.*

The treatment of religious organizations under the Act is of the same fundamental character as the treatment arising under the challenged statute in *Larson*. The exemption criteria in the Act make "explicit and deliberate distinctions" that "effectively distinguish" between religious institutions with different beliefs regarding social service. Specifically, the Act exempts institutions that hold as a matter of doctrine that it is necessary to employ and serve only those who share their religious "tenets," but it does not exempt institutions that hold as a matter of doctrine that when providing social services it is appropriate to employ and serve all people without regard to their faith. Likewise, it distinguishes religious institutions that believe that service is part of the process of inculcating religious values from institutions that believe that service can be provided apart from inculcation of values.

The Court of Appeals for the District of Columbia recently examined a classification similar to the exemption criteria in the Act. In *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), the court struck down the "substantial religious character" test used by the NLRB to determine whether it may exercise jurisdiction over a religious employer. This test involved, among other things, an examination of the religious beliefs of the student body and faculty and a determination of the extent to which other views are tolerated on campus. *Id.* In support of its conclusion, the court noted that the test "may minimize the legitimacy of the beliefs expressed by the religious entity." *Id.* at 1345. The court correctly observed that if an

entity "is ecumenical and open-minded, that does not make it any less religious." *Id.* at 1346. Therefore, "[t]o limit the . . . exemption to religious institutions with hard-nosed proselytizing [and] that [serve only] members of their religion . . . is an unnecessarily stunted view of the law, and perhaps even itself a violation of the most basic command of the Establishment Clause – not to prefer some religions (and thereby some approaches to indoctrinating religion) to others." *Id.* (citing *Larson*, 456 U.S. at 244).

This distinction among types of religious institutions undermines the State's argument that the exemption in the Act is neutral and generally applicable because it does not discriminate among religions, but applies to all faiths in the same manner, exempting some but not all parts of all religious organizations. This position is factually wrong. The exemption does not exempt any part of those religious organizations that do not oppose contraception on religious grounds. Likewise, it does not exempt any part of those religious organizations that employ or serve in significant numbers persons who do not share their religious tenets.

Finally, *amici* note that the Act creates an impermissible governmental incentive for religious institutions to adjust their theology and form of ministry. *See Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 343-44 (1980) (Brennan, J., concurring). For instance, religious institutions have an incentive to emphasize to a greater degree the extent to which inculcation is an ultimate purpose that underlies all of its service activities. Likewise, the Act creates an incentive for religious institutions to employ and serve only those persons who share their religious tenets. These incentives work deterrence on religious doctrine that emphasizes service apart from evangelism and that downplays the importance of association with co-religionists in the provision of services.

In applying the neutrality requirement, the Court has stated that it must "survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Lukumi*, 508 U.S. at 534 (internal quotation marks and citation omitted). In the instant case, the survey is not difficult. With respect to its express terms, its purpose, its disparate impact and its incentives, the religious employer exemption in the Act fails to comply with the neutrality principles worked out in *Lukumi* and *Larson*. Therefore, the California Supreme Court should have required the exemption to pass muster under the strict scrutiny standard.

B. The California Statute at Issue is Not Generally Applicable Because it Contains Exemptions Harmful to its Immediate Objectives.

In assessing the general applicability of a law, this Court has stated that "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542. Because the city ordinances at issue in *Lukumi* were "underinclusive" with respect to the city's interests in preventing cruelty to animals and protecting public health, the Court determined that the city's laws were not generally applicable. The Court noted that the ordinances "fail to prohibit nonreligious conduct that endangers those interests in a similar or greater degree than Santeria does." *Lukumi*, 508 U.S. at 543. Further, the Court noted that "we need not define with precision the standard used to evaluate whether a prohibition is of general application, *for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.*" *Id.* (emphasis added). *See also Fraternal Order of Police, Newark*

Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999) (holding that a ban on beards for police officers was not generally applicable since it provided an exception for medical purposes); *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996) (holding that a university policy requiring all freshmen to live in on-campus dormitories was not generally applicable since it included exemptions for certain students).

In *Fraternal Order of Police*, the Court of Appeals for the Third Circuit distinguished between (1) exemptions from a general law for activity that does *not* implicate the interests protected by the law and (2) exemptions for activity that *does* directly impact those interests. The court noted that insofar as the medical exemption from the "no-beards" policy for uniformed officers at issue in that case directly undermined the police department's interest in uniformity, the policy triggered strict scrutiny. *Id.*

The "religious employers" exemption in the Act is comparable to the medical exemption to the "no-beards" policy in *Fraternal Order of Police*. By allowing certain employers to offer prescription drug benefits that do not include contraceptives, the "religious employers" exemption directly implicates the state's interests under the Act. Since the exemption is not limited to employers who only employ persons having a religious objection to the use of contraceptives, there is no assurance that the exemption will not affect female employees wishing to use prescription contraceptives. Because the Act grants such exemptions to some employers but not others, the protections of the general applicability standard are not present.

Further, this effective exemption of certain employers indicates that the state has determined that the economic cost of requiring such employers to provide prescription

contraceptives for their female employees (and the political cost of imposing such a requirement) is greater than the social cost of requiring religious employers to provide such coverage in violation of their religious conscience. This political preference for the economic interests of the implicitly exempt employers over the religious interests of religious institutions covered by the Act represents another sense in which the Act is not neutral with respect to religion. The government is not acting neutrally with respect to religion when it places a higher value on economic interests than religious interests. *See generally Lukumi*, 508 U.S. at 532-542; *Horen v. Commonwealth*, 479 S.E.2d 553, 556-57 (Va. App. 1997) (holding that state law banning possession of owl feathers is not neutral because it includes secular use exemptions, *e.g.*, for museums, but does not exempt religious uses).

II. CERTIORARI IS WARRANTED TO ADDRESS THE IMPORTANT FEDERAL QUESTION WHETHER THE "CHURCH AUTONOMY DOCTRINE" ARTICULATED IN *WATSON V. JONES*, 80 U.S. (13 WALL.) 679 (1871), *KEDROFF V. RUSSIAN ORTHODOX*, 344 U.S. 94 (1952), AND OTHER CASES PERMITS STATES TO ADVANCE STATE INTERESTS BY EMPLOYING RELIGIOUS CRITERIA TO CLASSIFY RELIGIOUS INSTITUTIONS.

A. The Church Autonomy Doctrine Prohibits The Government From Using Religious Criteria To Classify Religious Institutions.

The religious employer exemption in the Act requires state officials – particularly the courts – to interpret religious doctrine, to discern the religious significance of

the activities and values of religious institutions, and, ultimately, to distinguish among religious institutions based on an assessment of the religious nature of their activities. In addition to violating the Free Exercise clause, these requirements also violate the Church Autonomy doctrine since they interfere with the self-identity of religious institutions, involve government officials in activities outside of their competence, and entangle government officials with religion in a way that results in government favoritism and influence.[3]

The rationale underlying Church Autonomy law was expressed by Thomas Jefferson:

> I consider the government of the U.S. as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline,

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[3] Professor Douglas Laycock is the first to have named the principle invoked here as the Doctrine of "Church Autonomy." The United States Supreme Court has subsequently adopted the term. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 341-46 (1987) (Brennan and Marshall, JJ., concurring). Professor Laycock identifies the Church Autonomy principle as a Free Exercise value. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981). The courts have recognized the principle sometimes as a Free Exercise value, *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 107 (1952), sometimes as a non-establishment value, *Meek v. Pittenger*, 421 U.S. 349 (1975), Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Government Power*, 84 Iowa L. Rev. 1 (1998), and sometimes as a value which springs both from the Free Exercise Clause and from the anti-entanglement notions of the Establishment Clause. *Presbyterian Church of the United States v. Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969). The Court generally has taken the latter approach by identifying the value as a general "First Amendment" value without specifying whether it springs from the Free Exercise Clause, the Establishment Clause, or both.

> and exercise. Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. . . . Every religious society has a right to determine for itself the times for [its religious] exercises, & the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the constitution has deposited it.

Thomas Jefferson Letter to Rev. Samuel Miller (1808) from *Thomas Jefferson: Writings*, 1186-87 (Merrill D. Peterson ed. 1984).

The doctrine of Church Autonomy is at the very heart of the Religion Clauses because it – unlike the Free Exercise Clause's compelling governmental interest and least restrictive means analyses and unlike the Establishment Clause's secular purpose and primary effect analyses – involves no weighing of competing interests between church and state. Application of the doctrine of Church Autonomy simply inquires whether the law at issue requires an interpretation of or interference with religious doctrine, polity, discipline, canon law, or ecclesiastical relationships.

The line of cases articulating the Church Autonomy principle begins with *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). *Watson* involved a property dispute between the pro-slavery and anti-slavery factions of a divided Presbyterian congregation in postbellum Kentucky. The *Watson* Court held that disputes in hierarchical churches should be decided by a rule of judicial deference to the ecclesiastical hierarchy. The Court first reasoned that this rule is required by the right of religious institutions to determine their own religious identity:

> The law knows no heresy and is committed to the support of no dogma, the establishment of no

> sect. The right to organize voluntary religious associations to assist in expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all individual members, congregations, and officers within the general association is unquestioned. . . .

Id. at 728-29. The court explained that the rule also recognizes the limits of judicial competence. "It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to the one which is less so." *Id.* at 729.

Finally, the court recognized that should it and other civil courts assert jurisdiction over internal church affairs, the civil litigation would inevitably result in wholesale entanglement of government in religious affairs:

> [I]t is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, and would open the way to all the evils which we have depicted. . . .

Id. at 733-34.

In *Kedroff*, the Court affirmed the principles articulated in *Watson*, stating

> [*Watson*] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

344 U.S. at 116.

Watson's wake is wide and deep, with published precedents approvingly invoking its authority over 920 times. Its holding and rationale, as the Supreme Court itself predicted, have had "far-reaching consequences," *id.*, and have caused courts to decline jurisdiction in at least six types of cases, including intra-church property disputes;[4] certain disputes arising from church-related trusts;[5] church-minister disputes;[6] clergy malpractice claims;[7] parishioner discipline controversies;[8] and church speech claims.[9] In these

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[4] *E.g., Kedroff*, 344 U.S. 94 (1952) and *Wheeler v. Roman Catholic Archdiocese of Boston*, 378 Mass. 58, 389 N.E.2d 966 (1979).

[5] *E.g., Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *see Krauthoff v. Attorney General*, 240 Mass. 88, 132 N.E. 865 (1921).

[6] *E.g., McClure v. The Salvation Army*, 460 F.2d 553 (5th Cir. 1972) and *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989).

[7] *E.g., Nally v. Grace Community Church of the Valley*, 47 Cal.3d 278, 253 Cal.Rptr. 97, 763 P.2d 948 (1988); *Ayon v. Gourley*, 47 F.Supp.2d 1246, 1250 (D. Colo. 1998).

[8] *E.g., O'Connor v. Diocese of Honolulu*, 889 P.2d 261 (Hawaii 1994) and *Parish of the Advent v. Episcopal Diocese of Massachusetts*, 426 Mass. 268, 688 N.E.2d 923 (1997).

[9] *E.g., United States v. Ballard*, 322 U.S. 78 (1944); *Klagsbrun v. Va'Ad Harabonim of Greater Monsey*, 53 F.Supp.2d 732 (D.N.J. 1999), and *Parish of the Advent*, 426 Mass. 268, 688 N.E.2d 923 (1997).

cases and others, the Court has consistently refused to permit government officials to use religious criteria to classify or distinguish among religious institutions. With respect to the rationale underlying *Watson*, such classifications invade upon the right of religious institutions to define and interpret their own doctrine, including the religious significance of their activities. In addition, government officials are not competent to interpret and apply such classifications. Finally, such classifications result in excessive entanglement between government officials and religious institutions, creating a substantial risk of undue influence or government favoritism. This risk is heightened by the fact that to apply such classifications, the state must (implicitly at least) adopt and promote a particular orthodoxy.[10]

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[10] *See, e.g., Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953) (overturning a conviction for holding "religious meetings" in a public park because the distinction between "worship" and an "address" on religion was inherently a religious question and invited discrimination); *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981) (distinction between "religious worship" and other forms of religious expression rejected on the basis that it "[lacked] intelligible content," that it was "highly doubtful that [the distinction] would lie within the judicial competence to administer," and that, in any event, the proposed distinction was constitutionally irrelevant); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 844-45 (1995) (cautioning a state university to avoid having to distinguish between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (recognizing a problem when government attempts to divine which ecclesiastical appointments are sufficiently related to the "core" of a religious organization to merit exemption from statutory duties); *id.* at 344-45 (Brennan, J., concurring) (same); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (holding that it is desirable to avoid entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs).

B. The Exemption Criteria in the Act Impermissibly Use Religious Criteria to Classify Religious Institutions.

The first prong of the exemption contained in the Act requires state officials to determine what values of a religious institution are "religious values" and whether the purpose of the institution is to inculcate such values. Put differently, in order to ensure that a religious institution does not have the purpose of "inculcating religious values," a government administrator must discern the religious significance (or lack thereof) of the values and activities of a religious institution. For instance, if an institution promotes honesty, or respect for parents, or care for the needy, state officials must determine if any of these values are religious. Clearly, some religious institutions would identify these as religious values, whereas others may not. But the important point is that state officials cannot make this inquiry without offending the Church Autonomy doctrine.

On the one hand, state officials may attempt to discern the religious nature of an institution's values by interpreting its religious doctrine, a task which is clearly outside of their competence. State officials are no more competent to identify and interpret a value as a "religious value" than were the officials in *Fowler* competent to discern between whether a particular event constituted "worship" or a "religious address." Alternatively, state officials may compare the institution's values with values they implicitly consider to be "religious values." However, this approach also fails since it creates an implicit state defined orthodoxy regarding religious values and interferes with the right of religious institutions to determine and apply their own doctrine. In short, as with the rejected

test in *Fowler*, *Widmar*, and *Great Falls*, the "religious values" test entangles the government in theological classification, and invites covert religious favoritism.

Similar problems also arise with respect to discerning whether the purpose of an activity is to "inculcate" or merely "express" religious values. Such discernment requires precisely the inquiry into the religious significance of words and practices rejected in *Widmar*. For instance, suppose a religious institution expresses its religious value of caring for the needy solely by providing meals and shelter. Further, suppose the religious institution believes as a matter of doctrine that it is to "teach by example" rather than by preaching. In this case, the religious institution has two purposes related to its religious values for its activities: to serve and to teach. However, because state officials are not competent to interpret the institution's doctrine, they cannot conclude based on this doctrine that the purpose of the institution is to inculcate its religious values. So instead, they may conclude based on their own conceptions of orthodoxy that the purpose of the institution is not to inculcate religious values. But this conclusion favors one religious doctrine of inculcation over another.[11] Indeed, a more discriminatory

[11] There is no way to avoid the fact that theologically "liberal" activities will often appear to minor local officials as "secular" whereas theologically "conservative" or orthodox activities will more likely be regarded as "inculcating religious values." It is increasingly recognized that, when it comes to religion and public life, the significant distinctions no longer track the denominational lines separating Protestants, Catholics, Jews, and Muslims. Instead, religious believers are more meaningfully categorized as traditional or "orthodox" and theologically liberal or "progressive" (whether Protestant, Catholic, Jewish, or Muslim). *See* James Davison Hunter, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 42-46 (1991). Professor Hunter explains that orthodox

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rule than one that privileges some theological traditions over others could hardly be devised.

The second and third prongs of the religious employer exemption also raise insurmountable issues of lack of competence and interference. These prongs require state officials to determine whether employees and service recipients share the religious tenets of a religious institution. As such, they require the state to inquire into the beliefs and tenets of both the employees and the service recipients of a religious institution, and to compare these beliefs and tenets with those of the religious institution. This is precisely the type of "intermeddling" the Founders proscribed (and that most recently has been rejected in *Great Falls*). Further, this is essentially the same comparison of doctrine the Court refused to conduct in *Watson*. Finally, as discussed above, this is a task for which state officials (and the courts) are manifestly not competent.

The requirement that contraception be "contrary to [the] religious tenets" of a religious institution creates an additional level of inquiry into religious doctrine. This is because a religious institution may be opposed to some forms of contraception (*e.g.*, abortifacients), but not others. Hence, state officials may need to determine whether each

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believers are devoted "to an essential, definable, and transcendent authority," whereas progressives "resymbolize historic faiths according to the prevailing assumptions of contemporary life." The latter type of religious organizations, those most likely to align with contemporary culture, will, unsurprisingly, appear less "religious" or sectarian to government officials, while those who are more conservative in their theology and who ignore cultural assumptions will appear more sectarian.

federally approved prescription contraceptive violates the religious tenets of a religious institution.

The Court's *Amici* emphasize that the problem here is not that government officials are simply interacting with religious organizations. Some regulatory interaction – indeed, some adjustments and cooperation – between government and religious organizations is inevitable, given that government keeps getting bigger and society more complex. *Amici's* argument here is not that the inevitable and unremarkable regulation that affects the operation of religious organizations necessarily invades the "privacy" of religious groups. Rather, we object to a government effort to exceed its constitutionally limited powers by adjudicating subject matters reserved to the sole cognizance of religion and religious organizations, matters that were, using Professor Rakove's apt term, "deregulated" at the Nation's founding.[12]

CONCLUSION

The Court's *amici* urge that the California Supreme Court has taken a dramatically different and wrong-headed course from that laid out by this Court in the somewhat hazardous waters of First Amendment church-state jurisprudence. The California court's decision consequently warrants review by this Court with an eye toward providing guidance to the several States and the federal

[12] *See* Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 311-12 (1997) ("[A]t the heart of [Madison's and Jefferson's] support for disestablishment and free exercise lay the radical conviction that nearly the entire sphere of religious practice could be safely deregulated, [and] placed beyond the cognizance of the state[.]").

system over the meaning and parameters of the Court's decision in *Oregon Employment Division v. Smith*, 494 U.S. 872 (1990).

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